Supreme Court, U. S.
FILED
AUG 4 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 75-1064

JACK B. KREMENS, et al.,
Appellants,

vs.

KEVIN BARTLEY, et al.,
Appellees.

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania

BRIEF OF THE YOUTH LAW CENTER AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

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BRIEF OF THE YOUTH LAW CENTER AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE[1]

The Youth Law Center, a legal services program funded principally by the federal Legal Services Corporation, was created in 1970 for the express purpose of promoting reform of the law in the area of children's rights and juvenile law. Primarily concerned with the status and needs of children and adolescents in this society, Center attorneys have represented

[1]Written consent for the filing of this Brief *Amicus Curiae* in the form of letters from counsel both for Appellants and for Appellees, pursuant to Supreme Court Rule 42(2), have been filed with the Clerk of this Court under separate cover.

young persons in numerous cases dealing with their constitutional and statutory rights. Youth Law Center attorneys have also appeared as counsel before this Court on behalf of children in cases dealing with juvenile court proceedings [*Breed v. Jones,* 421 U.S. 519 (1975)] and with public education [*Lau v. Nichols,* 414 U.S. 563 (1974)]. Moreover, Center attorneys have appeared on behalf of children in California appellate courts, including the California Supreme Court, regarding their placement in state mental hospitals through the action of juvenile courts [*In re Michael E.,* 15 Cal.3d 183, 538 P.2d 231, 123 Cal.Rptr. 103 (1975); *In re L.L.,* 39 Cal.App.3d 205, 114 Cal.Rptr. 11 (1974)], as well as through parental action such as in the present case [*In re Paul J.B., petition dismissed,* 1 Crim. 14811 (Cal. Ct. App., Dist. One, Div. One, June 30, 1976)]. The Youth Law Center also appeared as *amicus curiae* in the District Court in the present action. (Brief filed October 4, 1973; Appendix 2a).

Amicus curiae thus brings to this action a long-standing familiarity with the issues in this case as well as in similar cases. *Amicus* believes that the issues raised in this case present important questions of national significance, questions which are of obvious concern to children everywhere, not only to the children of Pennsylvania. *Amicus* believes that by its participation in this action it can bring before this Court considerations which will assist the Court in deciding the important questions raised by this appeal.

SUMMARY OF ARGUMENT

In the United States today, children and adolescents constitute a greater proportion of the total number of patients residing in mental hospitals than at any previous time during the last twenty years. Adolescents are being kept in mental hospitals for longer periods of time than are older patients, and disproportionately fewer adolescents receive alternative psychiatric care before being confined for treatment. In *Amicus'* opinion, these statistics raise the concern that too many children may presently be confined in mental hospitals and that for many of these children non-institutional care should first have been considered, but was not.

Amicus' concerns are deepened by the absence of due process safeguards available to minors who are placed in mental institutions by their parents or legal guardians. Under Pennsylvania law minors may be placed in mental hospitals subject only to the concurrence of a local medical facility or mental health agency and the admitting hospital. The absence of any requirement of a prior, or prompt, due process hearing is in distinct contrast to this Court's requirement of full due process procedures before minors may be committed to youth training schools through the juvenile justice system. *In re Gault,* 387 U.S. 1 (1967).

As *Amicus* will show, many children who commit deviant or anti-social conduct but are mentally ill are channelled to treatment facilities by juvenile courts. A juvenile court's jurisdiction over these

youngsters is quite extensive under statutes which cover not only delinquency, but also dependency and "status offenses." As the record in the present case shows, many members of appellees' class had committed delinquent behavior or other acts which clearly would have fallen within juvenile court jurisdiction. Under Pennsylvania law and this Court's decision in *Gault,* if these children had been taken to juvenile court, they would have been entitled to full due process hearings. Instead, through utilization of alternative procedures which are also designed to provide rehabilitative treatment, but which by-pass the due process procedures available in juvenile courts, appellees have been deprived of due process protections to which they would otherwise have been entitled. Such deprivation constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment.

In *Amicus'* view, the analogy between *Gault* and the present case is especially compelling because appellees here are subject to severe and massive deprivations of numerous constitutional rights just as are juveniles who are committed to training schools. These rights include liberty, privacy, and freedom of association—rights which are fundamental under our Constitution. Also like Gerald Gault, appellees are being confined for an indefinite time for the purpose of providing them with treatment, although many studies and scholarly articles confirm the *Gault* analogy: the promise of meaningful treatment for mentally disturbed or disordered juveniles is too frequently illusory. Unfortunately, many minors confined in

mental institutions are at best exposed to protective custody; at worst they live under brutalizing and inhumane conditions. Hence, unless there is some constitutionally adequate justification for treating appellees here differently from children in juvenile courts, appellees should receive the same due process protections mandated by *Gault.*

This Court has established that children are protected by the Due Process Clause of the Fourteenth Amendment; moreover, only a compelling reason may justify a state's deprivation of the fundamental right to liberty which is protected by that Clause. In the present case, the principal interests asserted by appellants are preservation of family unity and maintenance of parental authority. However, as this Court recently recognized in *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976), these goals are unlikely to be promoted by a scheme which denies even mature and competent minors legitimate participation in decisions vitally affecting their interests. In addition, as is implicitly suggested by *Planned Parenthood,* the parents' interests in family unity and harmony do not outweigh the child's right not to be involuntarily institutionalized and not to be stigmatized as mentally ill without a judicial hearing. When a parent seeks to place his child outside the family structure, the parent necessarily abrogates some of his normal freedom to be free from state scrutiny. In placing their children in mental hospitals, many parents are responding to familial difficulties to which the parents themselves

may be contributing and in which they are, in any event, participants. At such times and under such circumstances even the best-intentioned parent may find it difficult to make a rational decision about how to cope with intra-family strife. The potential, and frequently actual, conflict of interest between a child and his parents in such times of stress has caused a number of courts to hold that the distinct interests of the child in cases such as this can only be safeguarded in a judicial hearing at which the child is represented by independent counsel.

Appellants have also contended that referral to a mental hospital by a medical facility or mental health center is an adequate substitute for due process procedures. However, physicians are neither trained nor equipped to balance the mental health needs of patients against their civil liberties. Moreover, most psychiatrists have a quite natural bias which leads them to err in favor of committing healthy persons to mental hospitals rather than risking the error of allowing mentally disordered persons to go free. Given the time and resource constraints which frequently make comprehensive psychiatric evaluations impracticable, the psychiatrist tends to support the parent who has already concluded that his child needs hospitalization.

Finally, although Pennsylvania has now adopted regulations which accord minors over the age of thirteen some due process rights, these regulations are insufficient to ameliorate the defects in Pennsylvania's statutory scheme. The regulations do not

provide for a probable cause hearing, nor do they specify any time period within which a post-commitment hearing must be conducted. The regulations do not guarantee minors such due process protections as the right to counsel, cross-examination and confrontation of opposing witnesses, or a "clear and convincing evidence" standard of proof. Finally, the regulations deny even those minors who are mature and competent the right to volunteer themselves for treatment or to obtain treatment without parental consent. Hence, none of appellants' justifications for failing to provide due process protections to the children who are appellees in this case are sufficient to overcome the constitutional requirements which have been established by this Court and which are fully applicable here.

ARGUMENT

I. ADOLESCENT POPULATIONS IN MENTAL HOSPITALS ARE NOT DECLINING AS MUCH AS ARE OTHER AGE GROUPS, ADOLESCENTS ARE BEING KEPT IN SUCH HOSPITALS FOR PERIODS OF TIME LONGER THAN OTHER AGE GROUPS, AND DISPROPORTIONATELY FEWER ADOLESCENTS RECEIVE ALTERNATIVE PSYCHIATRIC CARE BEFORE BEING PLACED IN SUCH HOSPITALS.

This case raises significant issues affecting a large number of children and adolescents throughout the United States.[2] In fact, children and adolescents con-

[2] In 1973, the last year for which national statistics are available, a total of 10,576 children and adolescents under 18 years of age were resident patients in State and county mental hospitals in the United States. National Institute of Mental Health, Div. of Biometry, Statistical Note 113, Table 2a at 8 (Public Health Service Pub., February, 1975).

stitute a greater proportion of the total number of persons residing in mental hospitals in the United States today than at any previous time within the past twenty years. This increase has occurred although national policy has placed increasing emphasis in recent years on the use of community programs in place of hospitals for the mentally ill and mentally retarded.[3] Since 1950 and especially during the past decade, the number of adults in state and county mental hospitals has plummeted so that there were 55% fewer persons age 25 and over in such hospitals in 1973 than there were in 1950. At the same time, the percentage of children in state and county mental hospitals has increased, resulting in a 332% increase in the number of children under age 15 placed in mental hospitals between 1950 and 1973, and a 28% increase in the number of young persons between the ages of 15 and 24 so placed during the same period of time.[4] It is important to note that the "under age

[3]*See, e.g.*, Community Mental Health Centers Amendments of 1975, Pub. L. 94-63 Title III §302(a)(1): "[c]ommunity mental health care is the most effective and humane form of care for a majority of mentally ill individuals;" Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C.A. §6032(b): giving "special consideration to applications for grants" that demonstrate "an ability and commitment to provide within a community rather than in an institution services" for the developmentally disabled; Special Health Revenue Sharing Act of 1975, 42 U.S.C.A. §246(d)(2)(D)(i)(I): State plans must be "designed to eliminate inappropriate placement in institutions of persons with mental health problems."

[4]These percentage increases do not reflect certain variations which have taken place during the more recent years. "Nationally, the resident population [including adults] of State and county mental hospitals has been declining since 1956. In the interval from 1967-1973, the number decreased from 426,309 to 248,518, a decrease of 42%. The under 18 age group experienced slight *increases* each year from 1967 to 1970, but beginning in 1971, the *number* of residents under 18 has decreased each year, as has the rate per 100,000 population." National Institute of Mental Health, Div. of Biometry, Statistical Note 113, at 1 (Public Health Service Pub., February, 1975) (emphasis added). In spite of these more recent decreases in the whole number of young persons under age 18 in mental hospitals, referred to in Statistical Note 113, the proportion of such persons has continued to climb as compared with all other ages. Thus, although those under 18 constituted only 2.8% of the resident patient population of state and county mental hospitals in 1967, that figure had steadily climbed to 4.3% by 1973. *Compare,* National Institute of Mental Health, Div. of Biometry, Statistical Note 113, Table 2 at 7 (Public Health Service Pub., February, 1975), *with id.,* Table 2a at 8.

15" group does not include very many children who are under age 10. In fact, from 1969 through 1973, of those children under age 18 who were admitted to or resident in state and county mental hospitals, almost all were between the ages of 10 and 17. The actual percentages are as follows:[5]

	Under age 10	*Age 10-17*
1969	8.6%	91.4%
1970	6.8%	93.2%
1971	7.3%	92.7%
1972	6.9%	93.1%
1973	7.7%	92.3%

In addition to constituting an increasing percentage of the resident population of mental hospitals, young persons under 18 years of age remain in mental hospitals longer than do other age groups. For example, in state and local mental hospitals in 1971, the median number of days of stay was seventy-two (72) for those under 18 years of age and only forty-one (41)

[5]National Institute of Mental Health, Div. of Biometry, Statistical Note 115, Table 4 at 12 (Public Health Service Pub., April, 1975).

for all ages combined. Additionally, in private mental hospitals in 1970, the median number of days of stay for those under 18 years of age was thirty-four (34) as compared with twenty (20) days for all ages combined.[6]

A third characteristic of young persons in mental hospitals is that they have rarely received previous psychiatric care before being placed in such hospitals. Statistics available from 1969 reveal that well over half (53.5%) of the young persons under age 18 had received no previous psychiatric care before being placed into state and county mental hospitals, whereas, in contrast, only 38.7% of *all* admissions (a statistic which includes the under age 18 population as well as all others) had failed to receive prior psychiatric care before being so admitted.[7] Hence, it cannot be said that young persons are generally receiving alternative psychiatric services before being placed in mental hospitals.

Although these statistics do not resolve the important legal issues which are central to this case, they do provide cause for concern, in *Amicus'* view, that too many children may be found in mental hospitals

[6]National Institute of Mental Health, Div. of Biometry, Statistical Note 90, Table 8 at 14 (Public Health Service Pub., July, 1973). These ratios do not maintain to general hospital in-patient psychiatric units where the number of days of stay are ordinarily very short. In such units, the median for all ages is slightly higher than the median for the under 18 years of age group (11.4 as opposed to 9.7).

[7]National Institute of Mental Health, Div. of Biometry, Statistical Note 90, Table 9 at 15 (Public Health Service Pub., July, 1973).

in the United States today, that they may be kept in such hospitals for too long a time, and that they may not be receiving access to the alternative sources of psychiatric care which are generally regarded as being both appropriate and necessary for the treatment of mentally disturbed or handicapped persons. *Amicus* believes that the due process protections discussed hereinafter will do much to assure that these concerns will at least be considered before a child is placed in a mental hospital, and that without such due process protections there can be no guarantee that children will not continue to be placed in mental hospitals inappropriately.

II. MANY CHILDREN ARE PLACED IN MENTAL HOSPITALS AS AN ALTERNATIVE TO THEIR PLACEMENT IN TRAINING SCHOOLS BY JUVENILE COURTS.

A. The Jurisdiction of Juvenile Courts Extends to Many of the Children Who are the Subjects of this Action.

One of the principal bases of juvenile court jurisdiction is "status offenses," offenses only for children. President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Juvenile Delinquency and Youth Crime* 25 (1967). "Status offenses" commonly include within their definition behavior which is directly related to the relationships between juveniles and their parents. A typical "offense" is to be "beyond reasonable parental control." Levin and Sarri, *Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States*

11 (National Assessment of Juvenile Corrections, 1974).[8] Thus, appellants' contention in this case that the purpose of juvenile court proceedings is "to determine 'did he do it,'" is not correct with regard to a major portion of juvenile court jurisdiction. (Brief for Appellants at 40) Indeed, the determination to be made by the juvenile court is very similar to the determination to be made regarding the placement of children in mental hospitals in the present case. This is because the justification for incarceration of juvenile offenders in this country is their need for "rehabilitative treatment." In fact, in some states[9] a juvenile who does not need treatment is not even subject to the jurisdiction of the juvenile court at all. However, even in those states where the need for treatment is not actually jurisdictional, the purpose of juvenile court jurisdiction is to provide treatment to the offender, ". . . to provide for the care, protection and wholesome mental and physical development of children . . . ." Pa. Stat. Ann. tit. 11, §50-101(b)(1).

Hence, although there are some children in mental hospitals in this country who are seriously emotionally disturbed, for many of the children who are

[8]*See, e.g.*, Cal. Welf. & Insts. Code §601(a): "Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, or custodian, or who is beyond the control of such person is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court." Pa. Stat. Ann. tit. 11, §50-102(a): "'delinquent act' means: . . . (ii) a specific act or acts of habitual disobedience of the reasonable and lawful commands of his parent, guardian, or other custodian committed by a child who is ungovernable."

[9]*E.g.*, N.Y. Family Court Act §§731(c), 732(c) (McKinney, 1962).

under consideration here, placement in a mental hospital has been utilized as an alternative to juvenile court proceedings. If those children had been processed as "status offenders" by juvenile courts, they would have been subject to incarceration in much the same fashion, and often in the same institutions[10] as are juvenile delinquents who have committed criminal offenses. In 1974, for example, 23% of the males and 70% of the females incarcerated in juvenile correctional institutions in the United States were status offenders.[11]

B. Many of the Children in this Case Are Identical to Children Who Come Within the Jurisdiction of Juvenile Courts.

Because juvenile court laws and "voluntary" commitment statutes are exceedingly broad and share the same beneficent purposes—to provide treatment to juveniles—there are many children in state training schools who would have been likely candidates for placement in mental hospitals just as there are children in mental hospitals who might equally have been the subject of juvenile court proceedings.[12] For example, in *Morales v. Turman*, 383 F.Supp. 53 (E.D. Tex.

[10]*See*, Knudten, *Crime in a Complex Society*, Chap. 22 (1970); Sheridan, "Juveniles Who Commit Non-Criminal Acts: Why Treat Them in the Correctional System?" 31 *Federal Probation* 27 (1967).

[11]Hearings on S-821 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 94th Cong. 1st Sess., Appendix, pt.4 at 523, 525 (1976).

[12]The actual "Reasons for Admission" of children in the present case include such things as "violation of probation" (Steve Willett, 165a); "10 day evaluation at request of court" (Elizabeth Schriber, 164a); "Court—Stealing cars" (David Rhinehart, 163a); "charges of assault & battery while at Sleighten Farm" (Anita Jenkins, 162a); "Behavior problem: Sexual acting out, foul language,

1974), a case concerning juvenile training schools in Texas, the court found that a significant population of the training schools (372 juveniles) was "seriously emotionally disturbed" and that another large group of children (209 juveniles) in the institutions had "intelligence quotients recorded as lower than seventy." 383 F.Supp. at 88-89. In the case of *Martarella v. Kelley,* 349 F.Supp. 575, 591 (S.D.N.Y. 1972), the court quoted New York Family Court Judge Florence Kelley regarding status offenders: "I think some of our most seriously disturbed children are the ones who come in as alleged persons in need of supervision." In *Lollis v. New York State Dept. of Social Services,* 322 F.Supp. 473 (S.D.N.Y. 1970), the 14 year old plaintiff had been confined in the Brockwood Annex of New York's Hudson Training School for Girls for allegedly threatening her mother with a knife. Identical behavior in the present case precipitated the commitment of Leslie Levine to the Haverford State Hospital. (166a-168a) Mark Weand, who was also committed to Haverford State Hospital, had engaged in similar, though perhaps more serious behavior: he allegedly tried to kill his uncle with a knife while under the influence of drugs. (168a-171a)[13]

physically abusing stepmother, running away, crashing family car, drugs" (Benjamin Mosco, 151a); "Rebellion, aggressive behavior. Runaway, threatening to take drugs. Refusing out-patient care" (Mary Lou Gallagher, 144a); "PT [patient] excluded from mother's home; previous drug use; previous admission to this hospital" (Nancy Brehm, 138a); "3 wks. of truancy; 3 days of uncontrollable behavior; threatened suicide" (Willard Burnett, 136a).

[13]It should be noted that, in general, the ages of the children who are incarcerated in mental hospitals and who are the subject of this action, *see* pp. 8-9, *supra,* are approximately the same age as

One commentator has described the relationship between mental illness and juvenile delinquency as follows:

> . . . [S]tandards of deviance and acceptability are relative. . . . The same behavior may, depending upon the situation, be considered socially acceptable, mentally ill, or criminal . . . .
>
> For example, an adolescent who commits a car theft may confess to a policeman, be called a juvenile delinquent and be jailed. He may instead consult a psychiatrist and then he is likely to be labeled mentally ill and receive psychotherapy. . . . J. Zusman, "Society and Mental Illness," 15 *Arch. Gen. Psychiatry* 635, 636-37 (1966).

The testimony of experts in the present action underscores the relationship between the children and adolescents who are incarcerated in mental hospitals and those who are made subject to the juvenile court.

the children incarcerated in state training schools for juvenile delinquents and status offenders. *See* U.S. Law Enforcement Assist. Admin., Dep't of Justice, *Children in Custody,* Tables 9 and 10, at 12 (1971). Those tables show that no juvenile training schools held any children below age 6, only 9 training schools held any children below age 9, 47 training schools held children below age 12, and a total of 124 training schools had no children who were not at least 12 years of age. Although available statistics regarding the ages of children in mental hospitals are not distributed along exactly the same lines as in the training school report just referred to, it is instructive to note that in addition to the information set forth at page 9, *supra,* between 60 and 65% of the children in mental hospitals during the years 1969 through 1973 were between 15 and 17 years of age. National Institute of Mental Health, Div. of Biometry, Statistical Note 115, Table 4 at 12 (Public Health Service Pub., April, 1975).

The testimony of Dr. D. H. Miller, an adolescent psychiatrist who testified on behalf of appellants, is instructive:

> We have a policy in our hospital of open admissions and if we have a space we will admit someone.
>
> . . . We get children referred to us by parents directly. Sometimes by the juvenile court, sometimes by parents via some pressure from the school system, pediatrician or another psychiatrist.
>
> . . .
>
> . . . We will admit boys and girls sometimes under conditions which would certainly not fit the adult commitment laws in Michigan. (682a-83a).
>
> . . .
>
> We take youngsters who repeatedly run away from home and put themselves in danger by exposing themselves to who knows what and so on. (697a).

Dr. E. C. Messinger testified on behalf of appellees that "in practical terms, the institution that usually blows the whistle on trouble for a child is the school, because of truancy, academic failure, misbehavior in the school."[14] (620a) Finally, a document which was submitted by appellees in the District Court in this action described in detail "the reasons juveniles are institutionalized in the mental facilities in Pennsyl-

[14]School problems, especially truancy, constitute one of the principal bases of a juvenile court's "status offense" jurisdiction. *See* Levin and Sarri, *Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States,* 11-12 (National Assessment of Juvenile Corrections, 1974).

vania." (210a) That document, entitled "Incarcerated Juveniles—Why? The Mental Institutionalization of Juveniles in Pennsylvania," fully demonstrates what is contended here: placement of children and adolescents in mental hospitals is utilized by many parents as an alternative to referring those children to a juvenile court for disposition.[15]

C. Utilization of the "Voluntary" Commitment Process Instead of Providing the Due Process Procedures Available in Juvenile Court Proceedings Violates the Rights of the Children in this Case.

As has been shown, "status offenders" are subject to incarceration in juvenile training schools following adjudication by juvenile courts. They are also entitled to substantially the same due process protections in juvenile courts as are children who have been charged with criminal law violations. *In re Gault,* 387 U.S. 1 (1967). However, the present case demonstrates that unlike children who are adjudicated by juvenile courts, children who are placed in mental hospitals by their parents receive no due process pro-

[15]"Today courts and legislatures cooperate to punish summarily children who disobey their parents . . . . Under [such statutes], parents usually are the complainants . . . .

. . .

"The effect of the mistakes undoubtedly made on the side of parents in enforcing disobedient child law probably is very substantial. A very high proportion of those adjudicated juvenile delinquents, especially among girls, are so adjudicated under disobedient child laws. One purpose of making criminal such behavior as disobeying parents is to cast a wide net in order that the juvenile court may rehabilitate youths before they become habituated to criminal behavior." Klienfield, "Balance of Power Among Infants, Their Parents, and the State, Part II," 4 *Family L.Q.* 410, 436-37 (1970) (footnote omitted).

tections whatsover. Moreover, many of those children are identical to "status offenders" from the standpoint of the behavior[16] which leads to their placement in a mental hospital. Furthermore, the purpose of confinement in a juvenile training school is the same as the purpose of confinement in a mental hospital: the provision of treatment to beneficially affect the juvenile's behavior.

In very similar circumstances, this Court has held that a state may not bypass or ignore due process procedures in confining persons in institutions designed to provide them with treatment when it provides similarly situated persons with more stringent procedural protections. *Jackson v. Indiana,* 406 U.S. 715 (1972). Such discriminatory application of due process protections violates the Equal Protection Clause of the Fourteenth Amendment. *See Humphrey v. Cady,* 405 U.S. 504 (1972). *Baxstrom v. Herold,* 383 U.S. 107 (1966). These cases establish that when the state has created procedures that provide judicial hearings and other due process protections to a group of persons—such as "status offenders"—in order to confine them in institutions designed to provide them with treatment, it may not permit the confinement of a substantially similar group of persons—such as the children who are appellees in this case—through utilization of an alternative route that

[16]"We have to remember that in psychiatry, except for neurological diseases, we are dealing with behavior and the behavior that we are most concerned with is social behavior. That is how an individual influences or affects another." Testimony of Dr. E. C. Messinger (628a).

fails to provide those same protections. Hence, by permitting a parent to make the choice of (1) taking a child directly to a mental hospital for placement, subject only to having been referred by a mental health facility and having the hospital administrator approve the incarceration, or (2) taking a child to a juvenile court where the child will receive the representation of a lawyer, a judicial hearing, and all of the elements of a full due process proceeding before being placed in a treatment institution, Pennsylvania has unconstitutionally discriminated against appellees in this case.

III. INCARCERATION IN A MENTAL HOSPITAL IS A DEPRIVATION OF LIBERTY NO LESS SERIOUS THAN INCARCERATION IN A TRAINING SCHOOL FOR DELINQUENT JUVENILES.

A. Children are Protected in Their Liberty by the Due Process Clause of the Fourteenth Amendment.

In a succession of cases, this Court has affirmed the now incontrovertible proposition that children fall within the ambit of the Due Process Clause of the Fourteenth Amendment. *Goss v. Lopez,* 419 U.S. 565 (1975); *In re Gault,* 387 U.S. 1 (1967); *Kent v. United States,* 383 U.S. 541 (1966); *see, Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969) (First Amendment applicable to children); *Breed v. Jones,* 421 U.S. 519 (1975) (Fifth Amendment double jeopardy provisions applicable to children). As was observed in the landmark decision of *In re Gault,* the word "person" in the Due Process Clause is not limited to adults, for "neither the Four-

teenth Amendment nor the Bill of Rights is for adults alone." *In re Gault, supra,* at 13.

The due process protections of the Fourteenth Amendment have been extended to children both in what might be considered quasi-criminal proceedings, *e.g., In re Gault, supra; Kent v. United States, supra,* as well as in clearly non-criminal circumstances, *e.g., Goss v. Lopez, supra.* In *Goss v. Lopez* this Court specifically required that due process be provided to protect children's non-*de minimis* interests by holding that the state could not deprive a child of his statutorily derived right to attend school for even a few days without providing the child with notice and an opportunity to be heard. Hence, the applicability of the procedural safeguards of the Due Process Clause to the present case, where the threatened injury clearly exceeds the injury of a brief school suspension as in *Goss v. Lopez, supra,* should be readily apparent.

Assuring the protection of due process rights in the present case is especially appropriate because there can be no suggestion here that the interests of the children are *de minimis.* Commitment to a mental institution is, of course, a "massive curtailment of liberty" for children as much as for adults. *Humphrey v. Cady,* 405 U.S. 504, 509 (1972). Moreover, "liberty" is an "interest of transcending value," which affects numerous other constitutional interests of extreme importance. *Speiser v. Randall,* 357 U.S. 513, 525 (1958). Most obvious, perhaps, is the deprivation of the "right of free association, a right closely allied to

freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker,* 364 U.S. 479, 486 (1960). "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *N.A.A.C.P. v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958). *See DeJonge v. Oregon,* 299 U.S. 353, 364 (1937); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). "Both oral and written communications are included within the First Amendment guarantee of freedom of speech." *Palmigiano v. Travisono,* 317 F.Supp. 776, 786 (D.R.I. 1970).

Commitment to a mental hospital also substantially affects the "right to privacy" of children, a right which this Court has sometimes referred to as "the right to be let alone." As this Court said in *Stanley v. Georgia,* 394 U.S. 557, 564 (1969):

> [A]lso fundamental is the right to be free except in very limited circumstances, from unwarranted governmental intrusion into one's privacy.
>
> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most*

> *valued by civilized man." Olmstead v. U.S.,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928). (Emphasis added).

To similar effect are *Roe v. Wade,* 410 U.S. 179 (1973) and *Doe v. Bolton,* 410 U.S. 179 (1973); as this Court very recently has held, this right to privacy applies not only to adults but to children as well. *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197, 5204 (U.S. July 1, 1976).

B. The Due Process Clause of the Fourteenth Amendment Requires a Hearing Prior to Deprivation of Important Rights.

While there have been many controversies over the exact meaning of due process of law, it has uniformly been acknowledged that due process at a minimum encompasses the right to be heard.

> For more than a century the central meaning of procedural due process has been clear; 'Parties whose rights are to be affected are entitled to be heard. . . .' *Baldwin v. Hale,* 1 Wall. 223, 233.
> *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972).

Indeed, the opportunity to be heard has long been recognized as the *sine qua non* of due process, *Grannis v. Ordean,* 234 U.S. 385 (1914). It is not surprising, therefore, that in case after case this Court has held that the principles of due process of law compel the state to afford citizens some form of hearing before interference with personal or property rights of a substantial nature, *e.g., Goss v. Lopez,* 419 U.S. 565 (1975) (ten days of education); *Morrissey v. Brewer,* 408 U.S. 471 (1972) (parole revocation);

Fuentes v. Shevin, 407 U.S. 67 (1972) (property attachment); *Stanley v. Illinois,* 405 U.S. 645 (1972) (custody of one's children); *Bell v. Burson,* 402 U.S. 535 (1971) (revocation of driver's license); *Boddie v. Connecticut,* 401 U.S. 371 (1971) (access to divorce court); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971) (public stigmatization as inebriate); *Goldberg v. Kelly,* 397 U.S. 254 (1970) (termination of welfare benefits); *Sniadich v. Family Finance Corporation,* 395 U.S. 337 (1969) (wage garnishment).

The constitutional requirement of a due process hearing has been found to encompass deprivations of both property and liberty interests [*compare, Sniadich v. Family Finance Corp., supra* (property), *with Wisconsin v. Constantineau, supra* (liberty)], irrespective of whether the interest threatened emanates from a constitutional or statutory source [*compare, Stanley v. Illinois, supra* (constitutional), *with Goldberg v. Kelly, supra* (statutory)].

In assessing whether or not the interest involved warrants due process protections, this Court has consistently looked at the nature of the right involved rather than the severity or gravity of the deprivation threatened. As was observed recently,

> The Court's view has been that as long as the property deprivation is not *de minimis,* its gravity is irrelevant to the question of whether account must be taken of the Due Process clause.
> *Goss v. Lopez,* 419 U.S. at 576.

Although the length and consequent severity of the deprivation have been found to be relevant factors

in determining the appropriate form of the hearing, they are not decisive as to the basic right to a due process hearing. *Fuentes v. Shevin,* 407 U.S. at 86. Moreover, where liberty interests, rather than property or economic interests are at stake, this Court has been even more stringent in applying the requirements of the Due Process Clause. *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). Thus, where the liberty of an adult is threatened, this Court has imposed comprehensive due process protections, no matter how short the threatened confinement may be. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). *See Ackies v. Purdy,* 322 F.Supp. 38 (S.D.Fla. 1970). Indeed, if appellees were adults whose liberty was being deprived in the utter absence of notice and an opportunity to be heard, there is not the slightest doubt that these procedures would violate their fundamental right to due process of law. As many cases have established, appellees' status as children cannot serve as a justification for such a deprivation. *In re Gault,* 387 U.S. 1 (1967); *Goss v. Lopez,* 419 U.S. 565 (1975).

Appellants have contended before this Court that the above cases are inapposite because the present action,

> is not concerned with the power of the state *vis-a-vis* the individual. Here there is a direct confrontation between the wishes of the child and his parent. Rather than state versus individual in this case it is child versus parent. (Brief for Appellants at 28-29).

This argument ignores the fact that it is the state itself which sanctions the incarceration of the chil-

dren here, authorizing by law the procedures which have been attacked. Hence, it is a state law that is under attack (Pa.Stat.Ann. tit. 50, §§4402-03), necessitating the three-judge court below (a jurisdictional decision to which appellants have taken no exception).

Furthermore, appellants' contention in the present case has been effectively undercut by this Court's very recent decision in *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976). In the *Planned Parenthood* case, as here, the parent-child relationship was the focus of attention. In that case, state law operated to effectuate the parental decision that the child could not have an abortion, thereby infringing the child's fundamental right to privacy; here state law operates to effectuate the parental decision to incarcerate the child, thereby infringing what may be an even more fundamental right, the right to liberty itself. Hence, it is the effect of a state law's impact upon the parent-child relationship which distinguishes the present case, as well as the *Planned Parenthood* case, from the purely private decision-making to which appellants would have this Court defer.

IV. THE INTERESTS WHICH PENNSYLVANIA SEEKS TO VINDICATE DO NOT JUSTIFY MASSIVE CURTAILMENT OF APPELLEES' LIBERTY AND OTHER CONSTITUTIONALLY PROTECTED RIGHTS IN THE ABSENCE OF A JUDICIAL DETERMINATION THAT SUCH INTERVENTION IS APPROPRIATE AND NECESSARY.

As *Amicus* has demonstrated in Part III, *supra,* the confinement of a child in a state mental hospital implicates numerous rights of the minor which have been found worthy of constitutional solicitude. These include the minor's right to liberty, privacy, freedom of association with relatives and friends, as well as the minor's right not to have his bodily integrity invaded by enforced administration of psychotropic medication,[17] or his reputation injured by being stigmatized as mentally ill.[18]

In short, enforced confinement in a state mental institution constitutes a severe and pervasive infringement upon interests and values deeply cherished under our constitutional scheme. According to the due proc-

[17]*Cf. Winters v. Miller,* 446 F.2d 65 (2d Cir. 1971), *cert. denied,* 404 U.S. 980 (1971).

[18]*Cf. Goss v. Lopez,* 419 U.S. 565 (1975). This interest in not being stigmatized is, in *Amicus'* view, especially significant in light of the incontrovertible evidence that: "[t]he suspicion and mistrust that have surrounded mental illness since the time treatment first began by exorcising demons will haunt and hinder the expatient when he returns to society." *Note, Civil Commitment of the Mentally Ill,* 14 U.C.L.A. L. Rev. 822, 831 (1967). Besides the social ostracism involved, stigma from a mental commitment has a ". . . devastating effect on [the expatient's] employability." Calif. Assembly Subcomm. on Mental Health Services, *The Dilemma of Mental Commitments in California,* 57-9 (1972). Hence, the mental patient's interests which are affected by his commitment to a state hospital may even transcend the deprivations he suffers while confined. As one court has remarked, "the very livelihood of the individual may be at stake." *In re Ballay,* 482 F.2d 648, 668 (D.C. Cir. 1973).

ess analysis which has been adopted by this Court, interests which cannot be characterized as *de minimus* must be safeguarded by some type of due process hearing. *See* Part III, *supra.* Moreover, it is self-evident that Pennsylvania's scheme of authorizing long-term confinement of minors in state mental institutions, without according them even a judicial hearing[19] does not satisfy due process requirements. Only through a judicial hearing procedure can minors who are not mentally disordered, or who may be better treated in a non-institutional setting, avoid the debilitating consequences of improper or inappropri-

[19]Subsequent to initiation of this lawsuit, Pennsylvania enacted regulations providing that minors 13 years of age or older who have been voluntarily committed to state mental institutions may initiate civil commitment proceedings under Pa.Stat.Ann. tit. 50, §4406 (1969). The regulations also provide that each such minor must receive written notification of his rights including his right to request representation by the Public Defender's office. Pa. Dep't of Public Welfare, Pa. Bull., Vol. 3, at 1840, Sept. 1, 1973. Brief for Appellants 9-15.

Belated enactment of these regulations does not moot this case. First, because what has been done can readily be undone, it is established law that voluntary abandonment of unlawful practices does not render a case moot. *Gray v. Sanders,* 372 U.S. 368, 376 (1963); *Anderson v. City of Albany,* 321 F.2d 649, 657 (5th Cir. 1963). Second, the regulations only apply to minors 13 years of age or older; they do not accord any due process protections whatsoever to minors under the age of 13.

Third, even as to minors over the age of 13, the regulations are clearly inadequate. Referral of a minor's case for commencement of civil commitment proceedings pursuant to §4406 does not guarantee when such a proceeding will actually be initiated or adjudicated. Neither the regulations nor §4406 contain any time requirements. Hence, minors who wish to contest their confinements may languish in mental hospitals for weeks or months awaiting the commencement of civil commitment proceedings, without even a probable cause determination as to the grounds for their detention. Finally, the regulations fail to guarantee the minor's right to present testimony and to cross-examine adverse witnesses, relief which was granted by the court below and which has historically been viewed as an essential component of a due process hearing.

ate commitments. Only such a procedure will ensure the uniformity and rationality of the commitment process as it is applied in each individual case. Finally, only a due process proceeding will maintain the appearance of fairness which, as this Court has remarked in a related context, may be as vital to the success of the treatment program as the treatment procedures themselves. *In re Gault,* 387 U.S. 1, 26 (1967).

Nevertheless, Pennsylvania advanced certain interests before the trial court which, it has claimed, justify the absence of judicial scrutiny of these confinements. These interests include: (1) assuring the mental health of children (*parens patriae*); (2) protecting the community; and (3) preserving the family unit and maintaining parental authority. *See Bartley v. Kremens,* 402 F.Supp. 1039, 1048 (E.D. Pa. 1975). It should be noted that the first two of these purported state interests apply as well to mental commitments of adults. Moreover, these identical state interests have been found constitutionally insufficient in a long line of federal and state court decisions mandating procedural safeguards in civil proceedings by which adults are committed to mental hospitals.[20] And all three state interests which appel-

[20]*See, e.g., Sarzen v. Gaughan,* 489 F.2d 1076 (1st Cir. 1973); *In re Ballay,* 482 F.2d 648 (D.C. Cir. 1973); *Suzuki v. Quisenberry,* 44 U.S.L.W. 2422 (D. Hawaii, Feb. 24, 1976); *Kendall v. True,* 391 F.Supp. 413 (W.D. Ky. 1975) (three-judge court); *Lynch v. Baxley,* 386 F.Supp. 378 (M.D. Ala. 1974) (three-judge court); *Bell v. Wayne County General Hospital at Eloise,* 384 F.Supp. 1085 (E.D. Mich. 1974) (three-judge court); *Welsch v. Likins,* 373 F.Supp. 487 (D. Minn. 1974); *Dixon v. Atty Gen'l of Penna.,* 325 F.Supp. 966 (M.D. Pa. 1971) (three-judge court);

lants have advanced below have, either explicitly or impliedly, been rejected as justifications for denying minors procedural rights in every reported decision examining the applicability of the due process clause to the placement of minors in mental institutions.[21]

In their brief before this Court, appellants seek to distinguish the adult commitment cases on the basis that adults—unlike minors—possess the right to refuse recommended medical treatment.[22] This distinction is specious, however, because it is the characteristic feature of any mental commitment proceeding that persons who are viewed as incompetent to make decisions for themselves are being committed against their wishes for enforced treatment. *See* Pa. Stat.Ann. tit. 50, §§4405, 4406. Incompetent adults and minors are in functionally analogous positions because they are both considered legally incompetent to either choose or reject treatment. Appellants' at-

Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wis. 1972) (three-judge court), *vacated and remanded on other grounds,* 414 U.S. 473 (1974), *judgment reinstated,* 379 F.Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds,* 95 S.Ct. 1943 (1975); *People v. Feagley,* 14 Cal.3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); *Commonwealth ex rel. Finken v. Roop,* 234 Pa. Super. 155, 339 A.2d 764 (1975); *State ex rel. Hawks v. Lazaro,* 202 S.E.2d 109 (W.Va. 1974); *In re Fisher,* 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974); *State ex rel. Farrell v. Stovall,* 59 Wis.2d 148, 207 N.W.2d 809 (1973); *Denton v. Commonwealth,* 383 S.W.2d 681 (Ky. 1964); *Ex parte Perry,* 137 N.J.Eq. 161, 43 A.2d 885 (1945).

[21]In addition to the present case are *Heryford v. Parker,* 396 F.2d 393 (10th Cir. 1968); *J.L. v. Parham,* 44 U.S.L.W. 2421 (M.D. Georgia Feb. 26, 1976) (three-judge court), *appeal filed,* 44 U.S.L.W. 3686 (U.S. June 1, 1976); *Kidd v. Schmidt,* 399 F.Supp. 301 (E.D.Wis. 1975) (three-judge court); *Saville v. Treadway,* 404 F.Supp. 430 (M.D. Tenn. 1974) (three-judge court); *In re Long,* 25 N.C. App. 702, 214 S.E.2d 626 (1975).

[22]Brief for Appellants at 50-51.

tempt to distinguish the adult commitment cases on the basis that mentally ill adults can reject treatment is therefore unconvincing; furthermore, appellants do not even attempt to distinguish the juvenile commitment cases cited in note 21, *supra*. The impressive array of state and federal court cases which have invalidated both adult and juvenile mental commitment schemes is indicative of the almost universal conclusion that due process procedures are required when a person is placed in a state mental hospital.

Although such precedent is not binding upon this Court, *Amicus* urges that it be accorded the deference traditionally reserved for decisions by judicial tribunals which enjoy a greater proximity than this Court to the political and social conditions in their jurisdictions.[23] *Amicus* believes that only with the greatest reluctance should this Court substitute its judgment for that of the court below and of other courts which have heard live testimony as to the manner in which commitment procedures actually operate under the harsh light of reality. With the hope of assisting in illuminating that reality, *Amicus* shall now consider, *seriatim*, each of the interests advanced by Pennsylvania in favor of its so-called voluntary commitment procedure for juveniles.

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[23] *Cf. United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Propper v. Clark*, 337 U.S. 472, 486-87 (1949); *MacGregor v. Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942).

A. Assuring the Mental Health of Children.

1. At Common Law the Parens Patriae Authority of the Sovereign Was not Exercised to Institutionalize the Mentally Ill.

One of the state interests which, allegedly, is being promoted by the Pennsylvania voluntary commitment statutes is the promotion and protection of the mental health of Pennsylvania children. At common law the power of the King to act as guardian to promote the welfare of persons under legal disabilities was described by the term *parens patriae;* in modern days this royal prerogative of the King has passed to the states. *Hawaii v. Standard Oil Company,* 405 U.S. 251, 257 (1972). The power of the state to intervene in the affairs of children and incompetents is usually justified on the basis that both groups are incapable of exercising mature judgment. *See,* Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 STAN. L. REV. 1383, 1392 n.52 (1974).

What is significant for present purposes is recognition that at common law *parens patriae* was not invoked to justify actual confinement of the mentally ill. A person found to be a lunatic was ordinarily committed to the custody of a friend who received an allowance with which to care for the unfortunate person. *See* 1 Blackstone, *Commentaries* 305 (Hammond ed. 1890). Thus, having developed at a time when public institutions for the mentally ill were virtually non-existent, the *parens patriae* doctrine which developed at common law cannot now be used to justify confinement of the mentally ill in institutions such as the mental hospitals we know today. *See Lessard v.*

Schmidt, note 20 *supra,* 349 F.Supp. at 1084-86. Moreover, in colonial America, parents were expected to care for their own mentally disabled offspring. S. Brakel and R. Rock, eds., *The Mentally Disabled and the Law* 4 (1971). Hence, at common law and during the early stages of the history of this country, the authority of the sovereign to intervene *parens patriae* was not used to justify the more recent American innovation of using the Latin phrase to justify total, and in some cases permanent, loss of liberty. *See Lessard v. Schmidt, supra* at 1085; N. Kittrie, *The Right to be Different: Deviance and Enforced Therapy* 66 (1971).

In the juvenile sphere this Court has similarly traced the background of the state's purported power to deny minors procedural rights available to adults. This Court's conclusion with regard to the state's *parens patriae* authority over juveniles parallels the conclusions which have been reached with regard to the historical basis for the state's power over incompetents:

> The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. *In re Gault,* 387 U.S. 1, 17 (1967).

2. This Court's Analysis in In re Gault, Disposes of Appellants' Parens Patriae Argument.

In recent years this Court has consistently rejected "civil labels," "good intentions," or *"parens patriae"* as justifications for denying criminal due process safeguards to minors in juvenile court. *Breed v. Jones,* 421 U.S. 519, 530 n.12 (1975); *In re Winship,* 397

U.S. 358, 365-66 (1969); *In re Gault,* 387 U.S. 1, 18, 19 (1967). Instead, this Court has measured the need for due process procedures against what it has termed the "reality" of institutional confinement. *In re Gault, supra,* 387 U.S. at 26-31. In *Gault,* this "reality" was described by Justice Fortas as follows:

> The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a 'building with whitewashed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. *Id.* at 27.

The institutional surroundings; the absence of the minor's most cherished companions; compelled association with persons who have committed deviant and anti-social conduct; the pervasive deprivation of individual liberty: it is these realities which impelled this Court to require extensive due process safeguards in *Gault.* Even the slightest familiarity with state mental institutions elicits recognition that this Court's description of training school life in *Gault* is equally

applicable to our state mental institutions,[24] and therefore, that the due process protections against unwarranted or inappropriate commitments mandated by this Court in *Gault* are essential to safeguard the integrity of the mental hospital placement process.

The lack of adequate treatment resources in most of our state mental institutions is so widespread that in *Jackson v. Indiana,* 406 U.S. 715 (1972), this Court recognized that the rationale for most pre-trial commitments of "incompetent" criminal defendants is dubious, ". . . given the state of most of our mental institutions." *Id.* at 734-35. In a case before a three-judge federal district court, Pennsylvania conceded that only three percent of the inhabitants of one of its state mental hospitals received any therapeutic-psychiatric treatment whatsoever. *Dixon v. Attorney Gen'l of Penna.,* 325 F.Supp. 966, 969 (M.D. Pa. 1971). Two research psychologists who arranged to be admitted to Pennsylvania's largest mental institution, the Philadelphia State Hospital, reported that life inside the hospital was characterized by an overwhelming sense of boredom and betrayal. Because of a shortage of staff—only three attendants to every eighty-five patients—the patients learned that they

[24]"Recent studies—notably those of Drs. Erving Goffman, William Caudill, and Ivan Belknap, based on prolonged ward observation—attest to the continuance of the stripping of the patient, loss of his individuality and dignity, depersonalization, and demoralization. The chronically acute shortage of physicians in most wards makes the term 'psychotherapy' a hideous mockery for most patients. In most public mental hospitals, the average ward patient comes into person-to-person contact with a physician about fifteen minutes every month—not a day or a week, but a month." *Testimony of Dr. Albert Deutsch Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* pt. 1, 40, 43-44, 87th Cong., 1st Sess. (1961).

could earn little favors, such as coffee, cigarettes, and access to the sunlit dayroom, if they "learn to be sick" and cooperate with the staff. *New York Times,* January 14, 1969 at 10, col. 3.

As of June 30, 1966 there were only 180 full-time psychiatrists employed by Pennsylvania's eighteen state mental hospitals for an average daily census of 34,920 patients, resulting in a physician-patient ratio of 1 to 194. Note, *Hospitalization of the Mentally Disabled in Pennsylvania: The Mental Health and Mental Retardation Act of 1966,* 71 Dick. L. Rev. 300, 334-35 n.174 (1967). The figure of 180 psychiatrists includes 31 superintendents and assistant superintendents preoccupied with administrative functions as well as 43 psychiatric residents who principally train rather than care for patients. *Id.* Hence, the actual ratio of practicing full-time psychiatrists to patients in Pennsylvania in 1966 was one psychiatrist to 320 patients.

The snake-pit conditions of most of our mental hospitals is so widespread as to have received almost universal recognition.[25] These conclusions are sup-

[25]"[E]ighty percent of mental institutions are purely custodial, providing no treatment of any significance even to their law abiding patients. . . . A good portion of the remaining twenty percent provide adequate treatment only for well-paying private patients." Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment,* 57 Nw.U.L. Rev. 19, 22 (1962). In a very recent book a distinguished physician concludes with considerable dismay: ". . . the state psychiatric facilities can, at best, be described as medieval horrors and an offense to our civilization and a blot on psychiatry." Peskze, *Involuntary Treatment of the Mentally Ill* 67 (1975). "State mental hospitals suffer, perhaps, from more maladies than their inhabitants." Robitscher, *The Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient,* 18 Vill.L. Rev. 10, 11 (1972).

ported by numerous studies which have found that varying methods of in-hospital treatment of psychiatric patients have not differentially affected discharged patients' functioning in the community as measured by recidivism, post-hospital employment, or any other suitable measure of behavior.[26] Dr. Alan Stone of the Harvard Law School, who is perhaps the leading scholar in the country on the relationship between mental health and the law, has echoed these exact sentiments with regard to in-hospital psychiatric treatment of children. Stone, *Mental Health and Law: A System in Transition,* National Institute of Mental Health (DHEW Pub.No. (ADM) 75-176, 1975).[27]

In *In re Gault, supra,* this Court reiterated its concern—expressed earlier in *Kent v. United States,* 383 U.S. 541, 556 (1966)—that children charged with the commission of delinquent conduct receive, "the worst of both worlds"; they get "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *In re Gault, supra,* 387 U.S. at 18 n.23. *Amicus* believes

[26]The applicable literature is reviewed extensively in Schwitzgebel, *The Right to Effective Mental Treatment,* 62 Cal.L. Rev. 936 (1974). *See* Anthony, Buell, Sharott, and Althoff, *Efficacy of Psychiatric Rehabilitation,* 78 Psychological Bulletin 447 (1972).

[27]Professor Stone attributes the lack of available effective treatment for children to the following factors: "(a) Inpatient psychiatric facilities for children with rare exception have been horrendous. (b) Whatever the value of traditional diagnostic criteria may be they are not readily applicable to children, except in the case of profound illness. (c) Psychotherapeutic methods that do exist are geared to the intact family, and that is rarely the target group of the juvenile courts. (d) Finally, as Justine Wise Polier points out, the dollar and resource cost of the medical model approach is totally unrealistic." *Id.* at 146.

that the overwhelming weight of available evidence demonstrates that minors confined to state mental institutions are similarly: (a) subject to severe and massive deprivations of liberty; (b) often confined under conditions which can only be considered debasing and dehumanizing; and (c) receiving mere custodial care, rarely benefiting from any meaningful therapeutic treatment.

It is *Amicus'* position that as in *Gault, supra,* the institutional reality which greets minors who are processed through Pennsylvania's "voluntary admission and commitment" system (Pa.Stat.Ann. tit. 50, §§4402-03) must be considered by this Court in determining whether due process protections must be provided. And because at the very least, there is considerable cause to question whether the legislative promise of "treatment" will be fulfilled,[28] *Amicus* believes that rigorous due process procedures are necessary to safeguard the rights of minors who may not require institutionalization. As in *Gault, supra,* these due process protections are especially appropriate because the minor plaintiffs in the present case: (a) are being processed through a special system lacking the procedures available to similarly situated adults; (b) are given no choice in the decision to undergo treatment;[29] (c) are being confined in order to forcibly

[28]Pa.Stat.Ann. tit. 50, §§4402 and 4403 authorize confinement of minors in state mental hospitals by their parents solely "for examination, treatment and care."

[29]It is ironic that under Pa.Stat.Ann. tit. 50, §§4402 and 4403, the wishes of even mature and competent minors are immaterial to the treatment decision. Even minors who, in the hospital's view, clearly require treatment and who desire it may not be admitted for hospitalization under these statutes if their parents or guardians refuse to consent to their treatment.

provide them with treatment; (d) may be confined indefinitely until they attain their age of majority; and (e) will be released only when a discretionary determination has been reached that they are sufficiently "cured" or "rehabilitated" to warrant their return to society.

Appellants present three principal arguments as to why, in their view, the *Gault* due process analysis is inappropriate. *First,* they note that in *Gault* this Court confined its consideration to delinquency proceedings which are basically quasi-criminal in nature.[30] This distinction, if given determinative weight, paints *Gault* with too narrow a brush. As discussed earlier, this Court in *Gault* was concerned with far more than the quasi-criminal aspects of delinquency proceedings. If this Court's decision had turned solely upon the quasi-criminal nature of delinquency proceedings, there would have been no reason to focus at such length upon the realities and limitations of institutional treatment. Hence, this Court has not limited the application of the Due Process Clause to criminal or quasi-criminal proceedings. *See, e.g., Goss v. Lopez,* 419 U.S. 565 (1975); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

Appellants would convince this Court that the absence here of a legitimate police power interest in quasi-criminal conduct justifies a relaxation of due process rigor. Of course, the converse is true. Since the Pennsylvania voluntary commitment scheme is premised solely upon the state's interest in promoting

[30]Brief for Appellants at 37-40.

the health of its citizens, even greater vigilance is required to assure that persons are not being improperly denied their liberty.[31] The absence of any requirement that commitment be based on specific conduct, combined with the absence of clear-cut statutory criteria for commitment, suggests the abuses to which such a vague statute may be subject. Minors who have committed no anti-social acts, and who do not wish to be confined in state mental institutions, surely have as much right as the alleged delinquents in *Gault* to demonstrate that the state has not satisfied the criteria it has established for their institutionalization and treatment. As this Court stated in *Minnesota v. Probate Court,* 309 U.S. 270 (1940):

> We fully recognize the danger of a deprivation of due process in proceedings dealing with persons charged with insanity or, as here, with a psychopathic personality as defined in the statute, and the special importance of maintaining the basic interests of liberty in a class of cases where the law though 'fair on its face and impartial in appearance' may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings. 309 U.S. at 276-77.

Second, appellant notes the uncertainty of psychiatric diagnosis and suggests that, unlike an adjudication of guilt or innocence, mental commitment

[31]"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States,* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

proceedings serve little purpose other than to confirm previously made psychiatric diagnoses.[32] If this were true, it is curious that appellants also refer to studies[33] which show that requiring court review of medical diagnoses generally results in decreased institutionalization.

Of course, a mental commitment proceeding differs markedly from a criminal or delinquency trial in terms of the nature of the fact-finding adjudication which the jury or judge is required to make. However, this Court has found such a separate proceeding focusing upon dangerousness, habituality, or mental illness to be fully within the ambit of due process protection. *Specht v. Patterson,* 386 U.S. 605 (1967). Under Pa. Stat. Ann. tit. 50, §§4102, 4402, and 4403, a determination must be made that a minor who is to be voluntarily committed suffers from a "mental disability" and is in need of care, observation, or treatment. These statutory criteria are clearly susceptible to judicial scrutiny; and it appears quite probable that should such an issue be raised, Pennsylvania courts would also have to consider whether the mere satisfaction of such a standard warrants long-term confinement of mentally ill children.[34] It is also somewhat ironic that appellants are arguing that an adversary proceeding

[32]Brief for Appellants at 42-43.

[33]*Id.* at 44 and 37.

[34]This Court has suggested that there are due process limitations upon the state's power to confine involuntarily those persons who are mentally ill. *Jackson v. Indiana,* 406 U.S. 715, 737 (1972); *Cf. Humphrey v. Cady,* 405 U.S. 504, 509 (1972). Recently, in *O'Connor v. Donaldson,* 422 U.S. 563 (1975), this Court found in the due process clause substantive limitations upon the state's power to confine involuntarily mentally ill persons who are dangerous to no one and who can live safely in freedom. The approach

serves no useful function when, concomitantly, they offer their own belatedly created adversary mechanism for minors thirteen years of age or older[35] as a model of due process. The decision of appellants to accord adversary hearings to at least some minors vitiates their argument that such a process is nugatory.

Finally, appellants contend that *Gault* is inapplicable because here minors are being placed in a hospital by parents which, according to appellants, is qualitatively different from the court-ordered adjudication and commitment in *Gault.*[36] Appellants ignore in this part of their argument the fact that the Due Process Clause does circumscribe even a parent's discretion over his children in some areas.[37] But if appellants are basically claiming that there is no state action, it cannot be overlooked that appellee minors were confined in *state* mental hospitals pursuant to procedures and authority vested in those institutions by *state* statutes. And to the extent that appellees' parents are indigent, the cost of paying for their treatment is, presumably, borne by *state* taxpayers. Pennsylvania can no more readily escape responsibility for its own statutory scheme than could Arizona have circum-

taken by this Court in *Donaldson* suggests that even if, *arguendo,* Pennsylvania had declined to enact statutory criteria for "voluntary" commitment of juveniles, it would nevertheless be the function of the courts to determine if institutionalization in any given case was sufficiently related to a permissible state purpose to satisfy due process.

[35]Pa. Dep't of Public Welfare, Pa. Bull., Vol. 3 at 1840, Sept. 1, 1973.

[36]Brief for Appellants at 34-36.

[37]*Amicus* addresses this argument in Part IVC, *infra.*

vented *Gault* by legislating that parents could place minors directly in state training schools without the filing of juvenile court petitions.

B. Protecting Society.

A second permissible purpose which the state may seek to effectuate in institutionalizing its mentally ill minors is protection of the community. However, appellants have not seriously argued in this Court that the statutes under consideration are intended to effectuate this permissible state function. Nor would such an argument be tenable. Pa. Stat. Ann. tit. 50, §§4402 and 4403 authorize confinement of a minor in a state mental hospital upon application by his parent, guardian, or an individual standing *in loco parentis,* if it is determined that the minor is in "need of care or observation." Since the institutionalization of minors who pose no legitimate threat to the persons or property of others is sanctioned, it is evident that the scope of statutory authority exceeds the state's police power. In addition, the mere existence of a legitimate police power motive, even if promoted by the statutes, would not itself justify the absence of procedural safeguards. *Breed v. Jones,* 421 U.S. 519 (1975); *Jackson v. Indiana,* 406 U.S. 715 (1972); *In re Gault, supra; Heryford v. Parker,* 396 F.2d 393 (10th Cir. 1968); *People v. Feagley,* 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

C. Preserving the Family and Maintaining Parental Authority.

The principal interests which appellants assert in support of Pennsylvania's voluntary commitment

scheme are the preservation of the family unit and, especially, the maintenance of parental authority. Appellants note that the decision to provide a child with medical care has traditionally been considered the prerogative of the child's parents. Appellants equate long-term institutionalization of a child in a mental hospital with, for example, elective surgery; and they conclude that both procedures should be treated by the law in a similar fashion. In support of their contention that the state may intervene in the affairs of the family only in the most limited circumstances, appellants cite *Wisconsin v. Yoder,* 406 U.S. 205 (1972); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); and *Meyer v. Nebraska,* 262 U.S. 390 (1923).

At common law children were treated generally as the property of their parents—exercising few independent rights. A parent was considered the general guardian of the child's person even though the parent could not—except in limited, well-defined circumstances—dispose of the child's property. *See Hoyt v. Hammekin,* 55 U.S. 346 (1852); *Maryland Casualty Co. v. Lawson,* 110 F.2d 269 (5th Cir. 1940). It is sobering to recall that only one hundred years ago the American Society for Prevention of Cruelty to Animals was empowered by the courts to act in a case of cruelty to a child on the basis that a child is an animal. Mitchell, *The Child and Experimental Medicine,* 1 Brit. Med. J. 721, 722 (1964).

In recent years, however, courts have increasingly recognized the constitutional rights of children. *See, e.g., Goss v. Lopez,* 419 U.S. 565 (1975); *Tinker v.*

Des Moines Independent School District, 393 U.S. 503 (1969); *In re Gault,* 387 U.S. 1 (1967). Although these cases do not involve a direct conflict between the rights of children and the authority of their parents, these decisions treated children as independent entities exercising rights derived—not from their parents—but rather from their status as persons under the Constitution. In *Gault,* for example, this Court rejected the juvenile court rationale that a parent may be relied upon to protect the interests of the child. *In re Gault, supra,* 387 U.S. at 35.

Prior to its decision in *Planned Parenthood of Missouri v. Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976), this Court had never decided a case squarely presenting a direct conflict between children's rights and parental authority. Hence, the prior decisions of this Court which are relied upon by appellants, *Pierce v. Society of Sisters, Meyer v. Nebraska,* and *Wisconsin v. Yoder, supra,* are inapposite because each involved solely a conflict between the power of the state and the authority of the parent. Referring to this line of authority, one court has correctly noted:

> . . . those cases which have considered parental control of children have involved conflicts between parents and the state wherein the courts have considered intrusions by the state into the area of parental values—particularly religious values. Cases which have upheld parental control have not involved a situation where the parent and child differ and the state is imposing the parents' views on the minor. *Foe v. Vanderhoof,* 389 F.Supp. 947, 956 (D. Col. 1975); *see Baird v. Bellotti,* 393 F. Supp. 847, 856-57 (D. Mass. 1975), *vacated and remanded,* 44 U.S.L.W. 5221 (U.S. July 1, 1976).[38]

Although the conflict of interest between parent and child was not raised explicitly in any of these prior cases, it is certainly possible to read each of the decisions as vindicating not only the authority of the parent, but additionally the rights of the child. Hence, *Meyer v. Nebraska,* 262 U.S. 390 (1923), had at least the practical effect of enhancing the opportunities for minors who had not graduated from the eighth grade to study modern foreign languages. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), of course, vindicated a parent's right to send her children to private school; but this Court also made it quite clear that it was protecting as well the right of children not to be forced to receive a "standardized" education. *Id.* at 535. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), this Court assumed, without deciding, that both Amish children and their parents preferred that the children receive a non-public education. And in *Prince v. Massachusetts,* 321 U.S. 158 (1944), this Court emphasized that society's concern for the welfare of its children

> . . . is no mere corporate concern of official authority. It is the interest of youth itself. 321 U.S. at 165.

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[38] In *Foe v. Vanderhoof, supra,* the court was referring in its decision specifically to *Pierce v. Society of Sisters, Meyer v. Nebraska,* and *Prince v. Massachusetts, supra.* Although not referred to explicitly, the district court's comment also applies to *Wisconsin v. Yoder, supra,* where this Court qualified its holding by stating: "Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding." 406 U.S. at 231.

Hence, although these decisions did not expressly resolve conflicts between children's rights and parental authority, this Court did recognize that the child's welfare is an independent interest warranting solicitude and protection.

In *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976), this Court, for the first time, balanced the constitutional rights of children against the competing interests of their parents. This Court held that whatever interests a parent may have in the termination of his minor daughter's pregnancy was not more worthy of constitutional protection than the minor's right to privacy. Accordingly, this Court invalidated the Missouri statute which had conditioned the minor's right to an abortion upon parental consent. 44 U.S.L.W. at 5204.

Planned Parenthood, supra, is instructive in several significant ways. First, this Court recognized explicitly that minors possess constitutional rights independent of their parents, and that these rights are entitled to be safeguarded even against competing claims by the minors' parents. In the present case, these rights include, not only privacy, but also the right of the minor not to be denied liberty without due process of law—the constitutional safeguard which above all others distinguishes our system of orderly justice. *See Grannis v. Ordean,* 234 U.S. 385 (1914).

Second, in *Planned Parenthood,* this Court rejected the Attorney General's argument that requiring parental consent would be likely to further the state's interest in promoting family unity. 44 U.S.L.W. at 5204. Likewise, it must be seriously doubted whether vesting authority in parents to place their children in mental hospitals without a judicial hearing is likely to promote family unity or harmony. The child who has no role in the commitment decision, is, as this Court has elsewhere recognized, unlikely to have confidence in the person or the system which refuses to accord him legitimate participation in decisions vitally affecting his interests. *See, e.g., Breed v. Jones,* 421 U.S. 519 (1975).

Third, this Court held that the constitutional deficiency in the Missouri statute rested in its imposition of an absolute limitation on the minor's right to obtain an abortion. As explained by Justice Stewart in his concurring opinion, the statute failed to provide for "prompt" judicial resolution of disagreements between parents and minors. It also failed to provide for judicial determinations as to the minor's ability to give informed consent without parental concurrence, or as to whether abortion would, in any event, be in the minor's best interests. 44 U.S.L.W. at 5208-09.

The Pennsylvania statutes under challenge in the present case suffer from similar deficiences. They create an absolute limitation on the minor's right not to be forcibly placed in a mental hospital. Under Pa. Stat. Ann. tit. 50 §§4402 and 4403, the minor's wishes, maturity, and best interests are immaterial to the parents' placement decision. Although Pennsylvania has

adopted regulations[39] affording minors over the age of thirteen the right to request that a hearing be commenced on their behalf, the Pennsylvania regulations (even as to minors above the age of 13) fail to ameliorate the basic defects held fatal to the Missouri statute in *Planned Parenthood, supra.* As discussed more extensively at pp. 67-68, *infra,* the regulations fail to require that a hearing will be conducted within any specific period of time, fail to provide for mandatory appointment of counsel, and fail to consider the minor's ability to make an informed and mature decision as to whether confinement and treatment in a mental institution would be in the minor's best interests. The Pennsylvania regulations fail to extend the due process right to a *prompt* judicial hearing even to mature and competent minors. By rendering the due process right of such minors wholly subservient to the decisions of others, without requiring either appointment of counsel or judicial scrutiny within a reasonable period of time, the Pennsylvania regulations are wholly inconsistent with the thrust of *Planned Parenthood, supra.*

Finally, it is essential to recognize that the dissenting opinions in *Planned Parenthood, supra,* rested upon a factual foundation inapplicable in the present case. In dissent, both Justices White and Stevens stressed the important function of parental counselling in ensuring that the minor's decision to terminate her pregnancy would be reasoned and well-considered. 44

[39]Pa. Dep't of Public Welfare, Pa. Bull., Vol. 3, at 1840, Sept. 1, 1973.

U.S.L.W. at 5210. (separate opinion of White, J.); 44 U.S.L.W. at 5212-13 (separate opinion of Stevens, J.). The vital significance of the parent's role as counselor was supported by evidence in *Planned Parenthood, supra,*[40] as well as in *Bellotti v. Baird,* 44 U.S.L.W. 5221 (U.S. July 1, 1976), that physicians and other persons who work at abortion clinics are unable to adequately perform this counselling function.

No similar state purpose is promoted by the Pennsylvania scheme. First, it is questionable whether vesting commitment powers in persons other than the child, without recognizing the child's right to participate in the placement decision, would be likely to promote interchange between parent and child. Unlike the decision to terminate pregnancy, which is normally made at least initially by the minor, the decision to place a minor in a mental hospital can, and under Pennsylvania law frequently would, be made by a parent without prior consultation with his child. The purported mental illness of the minor would also be likely to discourage a parent from seeking the child's concurrence in the parent's commitment decision.

Second, assuming that some form of counselling would be desirable, a parent is not necessarily the appropriate person to perform that function. As more fully discussed in Part IV C 3 and 4, *infra,* many parents are too intensely involved, either in a conflict of interest or in the family's emotional difficulties to serve as dispassionate advisors to their children. To

[40]44 U.S.L.W. 5197, 5209 n.2.

the extent that the child's emotional problems are representative of broader familial dysfunction, the inappropriateness of the parent serving as counselor is self-evident.

Finally, under the decision of the court below, the minor would have available to him an attorney who could advise him as to both the legality and appropriateness of treatment in a mental hospital. This is a traditional role performed by the mental health bar, and would do much to ensure that the minor's decision to concur in, or to oppose, a placement in a mental hospital would be based upon the advice of a mature and neutral adult.

Amicus does not question the general authority of parents as the persons best suited and primarily responsible for the rearing of their children. Indeed, parental authority, while not absolute *(Prince v. Massachusetts, supra)*, is the cornerstone of our family structure. However, increasing recognition that children also have rights under our Constitution, even when those rights conflict with competing rights of their parents, as in *Planned Parenthood, supra,* requires a searching and sensitive examination of the interests and considerations pertinent to all parties.

Amicus believes that there are a number of significant factors which must be considered in determining when parental authority should be subject to judicial scrutiny. These include: (a) the nature and severity of the deprivation of the child's interests, and whether these interests are subject to constitutional protection; (b) the potential for harm to the

child; (c) whether the parents' decision has the effect of preserving, or disrupting, the family structure; (d) the potential for conflict of interest between parent and child; (e) the legitimacy in each situation of the normal presumption that a parent will act in his child's best interests; (f) the existence of non-judicial alternatives to safeguard the interests of the child; and (g) the child's capacity to make competent and reasoned determination as to what is in his own best interest. When these factors are closely scrutinized, the necessity for judicial review of the parent's decision to seek commitment of his child is evident.

1. Minors Who Are Inappropriately Confined in Mental Hospitals Are Subject to Severe Emotional and Psychic Harm.

As previously discussed,[41] the decision to confine a child in a state mental hospital implicates a number of the child's constitutionally protected rights. Children who are inappropriately confined in mental institutions are especially subject to severe emotional and psychic harm. *See Mathews v. Hardy,* 420 F.2d 607, 611 (D.C. Cir.), *cert. denied,* 397 U.S. 1010 (1970); *cf. In re Ballay,* 482 F.2d 648, 667 (D.C. Cir. 1973). Providing judicial review of commitments would serve to ensure that only those minors who require hospital treatment will be institutionalized.

2. The Decision to Commit a Child to a State Hospital Necessarily Constitutes a Disruption of Family Harmony.

When a parent seeks to place his child outside of the family structure, he cedes some of his normal priv-

[41] pp. 19-22, *supra.*

ilege to be free from state scrutiny. The state's ordinary reluctance to intervene in family affairs reflects an appreciation for the virtues in family autonomy. But when a parent removes a child from his family, and places him in a state institution, the sacrosanctity of family autonomy has already been breached by parental decision. There is no more reason to avoid judicial review of such a decision than there is of a parent's determination to place his child in a state training school, a local detention facility, or a juvenile camp. See *In re Gault, supra.*

Moreover, *Amicus* believes there is a qualitative difference between a parent's decision to seek medical treatment for his child, and his determination to commit his child to a mental institution. Medical care does not necessarily require hospitalization; but even if hospitalization is deemed necessary, institutionalization is ancillary to treatment. Mental commitments, on the other hand, are by definition custodial confinements. By their very nature such commitments are of indefinite duration and, frequently, are extensive in length. Given the absence of adequate treatment resources in many state hospitals,[42] the custodial confinement may itself become the treatment. *See* Braginsky, Braginsky & Ring, *Methods of Madness: The Mental Hospital as a Last Resort* 179-80 (1969). And, to quote Justice Frankfurter, as a result of ". . . the uncertainty of diagnosis in this field and the tentativeness of the professional judgment." [*Greenwood v. United States,* 350 U.S. 366, 375 (1956)], the psychi-

[42]*See* pp. 34-36, *supra.*

atrist's decision as to when a patient should be released from a mental hospital would appear far less subject to a set of commonly accepted medical norms than, for example, the decision as to when a hospital shall discharge a patient following a hernia operation.[43] Finally, as previously noted,[44] the stigma of having been found "mentally disordered" transcends any opprobrium which might attach to hospitalization for non-therapeutic, medical reasons.

Notwithstanding these differences between treatment in medical hospitals and mental institutions, many courts have circumscribed the parent's right to make *medical* decisions for his child when the potential consequences to the child are sufficiently grave and/or there is reason to believe that the interests of the child are not being fully considered by the parent. Hence, it is now commonly accepted that where it is necessary to save the child's life, a court may authorize blood transfusions for a child, even over the First Amendment objections of parents who are Jehovah's Witnesses. *See, e.g., State v. Perricone,* 37 N.J. 463, 181 A.2d 751 (1962), *cert. denied,* 371 U.S.

[43]Since Pennsylvania law does not require any initial determination as to dangerousness to self or others in order to commit a juvenile to a mental hospital under Pa. Stat. Ann. tit. 50, §§4402 and 4403, the hospital's decision to discharge a patient rests almost entirely upon a discretionary determination that the patient has been "sufficiently" cured. It is difficult to conceive of a standard which would vary more from hospital to hospital and physician to physician. See *Commonwealth ex rel. Finken v. Roop,* 234 Pa. Super. 155, 339 A.2d 764 (1975), finding the statutory commitment standard under Pa. Stat. Ann. tit. 50, §§4406, "in need of care" unconstitutionally vague: "Once a finding of mental illness is made, it would be impossible not to find that the individual is in need of care." 234 Pa. Super. at ....., 339 A.2d at 778.

[44]Note ***, *supra.*

890 (1962); *People v. Labrenz,* 411 Ill. 618, 104 N.E.2d 769 (Schaefer, J.), *cert. denied,* 344 U.S. 824 (1952). Contrary to appellants' assertions,[45] courts will intervene in behalf of children even where there is no threat to the life of the child. *In re Sampson,* 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972).[46] And although the Supreme Court of Pennsylvania has ruled that the state does not have a sufficient interest to overrule a parent's religious objection to surgery when the child's life is not immediately imperiled, the court refused to uphold the parent's authority as against the wishes of their sixteen-year-old son. Instead, the court remanded for consideration of the boy's desires. *In re Green,* 448 Pa. 338, 292 A.2d 387 (1972).

3. The Ordinary Presumption That Parents Are Acting in Their Child's Best Interests Is Often Questionable When Parents Seek to Transfer the Responsibility of Caring for Their Children to the State.

Most medical decisions concerning children are appropriately left to the discretion of parents; but as we have observed, courts are not unwilling to intervene where the consequences to the child appear sufficiently grave—especially when there is reason to believe that the child's wishes and interests, as distinguished from his parents', are not receiving ample consideration. Perhaps no other decision concerning

[45]Brief for Appellants at 32.

[46]Although in deciding *In re Sampson,* the New York Court of Appeals sought to distinguish its prior decision in *In re Seiferth,* 309 N.Y. 80, 127 N.E. 2d 820 (1955), relied upon by appellants, we submit that the effect of *In re Sampson,* concurred in by Chief Judge Fuld who had dissented in *Seiferth,* was to overrule the court's earlier case.

the health of children warrants independent scrutiny as clearly as the decision to commit a child to a mental institution.

Where familial dysfunction occurs, it makes little sense to vest commitment power in one of the family members—even a parent. Numerous studies and articles report that problem behavior in children is often symptomatic of ineffectual interpersonal relationships among family members.[47] A response of some parents to severe family stress is to scapegoat their children, in some instances even institutionalizing them so that the parents will not have to deal directly with these problems.[48] As for parents of mentally retarded young-

[47]*See, e.g.,* Spiegel, *The Resolution of Role Conflict Within the Family,* in *A Modern Introduction to the Family,* 361-81 (N. Bell & E. Vogel eds. 1960); Vogel & Bell, *The Emotionally Disturbed Child as the Family Scapegoat,* in *A Modern Introduction to the Family, supra,* at 382-97; Carek, Hendrickson, and Holmes, *Delinquency Addiction in Parents,* 4 *Arch. Gen. Psychiatry,* 357-62 (1961); Marrow, *Flexibility in Therapeutic Work with Parents and Children,* 38 *Bulletin of the Menninger Clinic,* No. 2, at 129 (March 1974); Kreisman and Jay, *Family Response to the Mental Illness of a Relative: A Review of the Literature,* 10 Schizophrenia Bull. 34 (1974).

[48]One study reports that, from the parents' standpoint, scapegoating their children is not without utility. "For the parents, scapegoating served as a personality-stabilizing process. While the parents of these children did have serious internal conflicts, the projection of these difficulties onto the children served to minimize and control them. . . . From the point of view of the family, the primary function of scapegoating is that it permits the family to maintain its solidarity. . . . In all the disturbed families, very serious dissatisfactions between spouses came to light during the course of therapy . . . ." Vogel and Bell, *The Emotionally Disturbed Child as the Family Scapegoat,* in *A Modern Introduction to the Family,* 394-95 (N. Bell & E. Vogel eds. 1960).

See Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Cal. L. Rev. 840, 859-62 (1974); T. Scheff, *Being Mentally Ill: A Sociological Theory* 171 (1966) (noting a Philadelphia study which found that in 25 percent of the complaints of mental illness, it was the complainant, rather than

sters, one commentator has enumerated some of the factors motivating such parents to seek institutionalization of their children, including the interests of other children in the family, the mental and physical frustrations of the parents, economic strain resulting from caring for the children at home, hostility resulting from the burden of caring for the children, and the parent's success-oriented expectations for their children. Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues,* 48 *Notre Dame L. Rev.* 133, 139-43 (1972). These considerations dramatize very real problems which confront parents of retarded or severely disturbed youngsters. The legal system, however, should not exalt the parents' difficulties over the children's needs by delegating an essentially unfettered power to parents who are in the midst of emotional turmoil.

The possibility that some parents may seek to avoid the responsibility for caring for their children has not escaped judicial recognition. Dissenting in *Kent v. United States,* 401 F.2d 408 (D.C. Cir. 1968), Mr. Chief Justice (then Circuit Judge) Burger commented,

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the prospective patient, who showed signs of mental illness); Kaufman, et al., *Treatment Implications of a New Classification of Parents of Schizophrenic Children,* 116 *Am. J. Psychiat.* 620 (1960); Stabenau, et al., *A Comparative Study of Families of Schizophrenics, Delinquents, and Normals,* 28 Psychiatry 45 (1965) ("It has long been recognized that for many troubled parents, the most acceptable way to seek help for themselves is to seek it, instead, for their child. The overt wish to have the child treated masks, in very many cases, the covert wish of parents to have themselves treated . . . ."); Rinsley and Hall, *Psychiatric Hospital Treatment of Adolescents,* 7 Arch. Gen. Psychiat. 286, 287 (1962).

> Lawmakers in recent years have been sensitive to the need to make civil commitment difficult recognizing the danger of relatives "farming" out their kindred into mental institutions for motives not always worthy. 401 F.2d 416 n.4.

In *New York State Association for Retarded Children, Inc. v. Rockefeller,* 357 F. Supp. 752, 762 (E.D.N.Y. 1973), the court admonished:

> There may be a fundamental conflict of interest between a parent who is ready to avoid the responsibility of caring for an abnormal child and the best interests of the child. [citation omitted].

And in a similar vein the North Carolina Supreme Court has concluded:

> The parent's admission of a child to a treatment facility may result from a variety of factors, and it is possible that not all of these factors stem from a legitimate concern for the child (citation omitted). *In re Long,* 25 N.C. App. 702, 214 S.E. 2d 626, 629 (1975).

Amicus is not contending that most parents who seek to commit their children are doing so for nefarious or ulterior reasons unrelated to what the parents perceive as the best interests of their children. The fact is, however, as the record below demonstrates,[49] some

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[49]From the Summaries of Selected Patients which are set forth in the Record, it is ineseapable that some children have been placed in mental hospitals for reasons other than their own need for treatment. *E.g.,* Report of Psychologist: "Mother shows considerable immaturity and inadequacy in handling children . . . ." (348a) Reason for Placement: "Poor family situation—mother does not get along with patient well. The family is '. . . afraid that the mother would have another nervous breakdown if it (placement) was not done soon.'" (354a) Psychological Report: "Since there

parents do have hidden agendas. Even the most well-intentioned parents may unconsciously attempt to shift the responsibility for their own or shared difficulties upon their children, while other parents may be responding hastily or unwisely to the pressure of familial dysfunction of which they are both a participant and a cause. It is difficult for parents to make rational choices when they feel the pressure of family problems, especially when the decision to place a child in a state mental hospital entails an expertise about the treatment of mental illness, and the existence of less intrusive methods of treatment, which the ordinary parent will usually not possess.

4. Children and Parents Who Disagree as to the Appropriateness of Institutionalization are in a Position of Fundamental Conflict of Interest.

There is, therefore, manifest potential for conflict of interests when parents seek the commitment of their children to mental hospitals. Where such potential conflicts exist, courts have not been reluctant to act in order to safeguard the independent interests of the child.[50] Due process procedures are the preferred

is a lack of community facilities which can provide emergency placement it is being recommended that this child be placed at Polk State School and Hospital for a period of 1 or 2 weeks so that the other family members can go on a family vacation." (357a)

[50]*See, e.g., McBridge v. Jacobs,* 247 F.2d 595 (D.C. Cir. 1957) (parent may not waive minor's right to counsel); *Horacek v. Exon,* 357 F.Supp. 71 (D. Neb. 1973) (separate guardian ad litem appointed to represent children suing to remedy conditions in state home for retarded); *State v. Wade,* 527 P.2d 753 (Ore. App. 1974), *appeal dismissed.* 96 S.Ct. 16 (1975) (because of potential conflict in all parental termination proceedings appointment of separate counsel for children is mandatory); *Melville v. Sabbatino,* 30 Conn. Supp. 320, 42 U.S.L.W. 2242 (1973) (minors over age of 16 can sign themselves out of mental hospitals even if their

and appropriate mechanism for ensuring that the best interests of the child will be considered independently of his parents' desires. The child's fate should not be clouded by a variety of parental pressures and concerns which, although pertinent to the treatment inquiry, ought not be dispositive. See *Heryford v. Parker,* 396 F.2d 393 (10th Cir. 1968); *Saville v. Treadway, supra; In re Long, supra.*

5. Two Psychiatric Evaluations, One of Which is Performed by the Committing Hospital, are an Inadequate Substitute for a Due Process Hearing.

Although appellants argue that the uncertainty of psychiatric diagnosis has been exaggerated, they concede a "relative" amount of uncertainty which, in their view, emphasizes the "questionable wisdom" of having medically "untrained" judges oversee the recommendations of professional psychiatrists.[51] The recent literature which *Amicus* has reviewed controverts appellants' argument. At the very least, there is considerable question as to the ability of psychiatrists, not only to predict dangerousness, but even to agree in

parents have admitted them); *In re Henry G.,* 28 Cal. App. 3d 276, 104 Cal. Rptr. 585 (1972) (error to preclude minor's counsel from inquiring into whether alleged breakdown in parental control resulted from mother's failings); *In re Smith,* 16 Md. App. 209, 295 A.2d 238 (1972) (minor's mother has no power to compel minor to undergo abortion against her will); *In re Anonymous,* 42 Misc. 2d 572, 248 N.Y.S.2d 608 (Nassau Co. Ct. 1964) (adoptive parent's application to commit ten year old child to mental hospital denied because minor's hallucinations caused by rejection of adoptive parents); *In re Sippy,* 97 A.2d 455 (Ct. of App., D.C. 1953) (where interests of mother and minor are sharply opposed regarding commitment of the minor to a "psychiatric school," the mother's attorney cannot purport to represent the minor.)

[51]Brief for Appellants at 42-43.

their most gross psychiatric diagnoses.[52] Given the demonstrable unreliability of psychiatric diagnosis, it is difficult to comprehend why appellants place so much reliance upon such a relatively crude instrument as a protector of the minor's liberty.

Under the Pennsylvania "voluntary" commitment system for minors, two psychiatric evaluations are required. First, there must be a referral from a recognized medical facility, mental health/mental retardation therapist, or mental health agency. The referral must be accompanied by a psychiatric evaluation indicating ". . . with specificity the reasons that the prospective patient requires institutional care."[53] Second,

[52]*See* Rosenhan, *On Being Sane in Insane Places,* 13 *Santa Clara Law.* 379 (1973) (8 sane persons, feigning mental illness, were admitted to mental hospitals and diagnosed as schizophrenic or manic-depressive; when released, none of the persons was considered by the hospital staff to be cured). Ennis and Litwack have reviewed the pertinent literature exhaustively and conclude that if a psychiatrist testifies that a patient falls into a specific, non-organic diagnostic category, ". . . it is more likely than not that a second psychiatrist would disagree." Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 *Cal. L. Rev.* 693, 702 (1974). In one experiment, twenty-seven experienced psychiatrists, all members of the same hospital, used a standardized set of statements to rate patients presented to them in a half-hour filmed interview. The psychiatrists ". . . were unable to agree as to the patient's diagnosis, prognosis, psychodynamics, the cause of her problems, the feelings she was consciously experiencing or the feelings that were latent . . ." Stoler and Geertsma, *The Consistency of Psychiatrists' Clinical Judgments,* 137 *J. of Nerv. Mental Dis.* 58, 64 (1963). In still another study, two skilled psychiatrists diagnosed twenty hospital patients for depression. Both psychiatrists labeled six of the twenty patients as depressed, but they did not choose the same six! Cherry and Cherry, *The Common Cold of Mental Ailments: Depression, New York Times Magazine,* Nov. 25, 1973 at 38; *see* Roth, Dayley and Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes,* 13 *Santa Clara Law.* 400 (1973).

[53]Pa. Dept. of Public Welfare, Pa. Bull., Vol. 3 at 1840, Sept. 1, 1973.

there must be an examination by the director of the mental hospital or by a staff member to determine if the patient is in need of "care" or "observation".[54] Neither the statutes nor the regulations specify precisely who will conduct the latter evaluation, how quickly it must be performed, or what the standard (other than need for care or observation)[55] will be for continued confinement.

It is arguable that many, if not most, persons in our society would benefit from some form of psychiatric treatment. The problem with the Pennsylvania scheme is that it fails to distinguish between those persons who would benefit from psychiatric treatment and those who require institutionalization. One examining psychiatrist might seek to hospitalize only persons who suffer from some form of psychosis. Another psychiatrist might wish to commit persons who suffer

[54]Pa. Stat. Ann. tit. 50, §§4402 and 4403.

[55]A number of courts have invalidated mental commitment standards which were based upon a determination as to whether a person is in need of care or treatment. These courts have insisted that involuntary confinements to mental institutions be limited to persons who have shown a propensity for harm to themselves or others. *Bell v. Wayne County Gen. Hosp. at Eloise,* 384 F.Supp. 1085 (E.D. Mich. 1974) (three-judge court) (imminent threat of physical harm to prospective patient or others); *Lynch v. Baxley,* 386 F.Supp. 378 (M.D. Ala. 1974) (three-judge court) (overt act showing real and present threat of substantial harm to prospective patient or others); *State ex rel. Hawks v. Lazaro,* 202 S.E. 2d 109, 123 (W. Va. 1974) (self-destructive urge or person will permit himself to die of starvation or lack of care); *Commonwealth ex rel. Finken v. Roop,* 234 Pa. Super. 155, 339 A.2d 764 (1975) (overt act raising substantial likelihood of future dangerous acts); *see Humphrey v. Cady,* 405 U.S. 504, 509 (1972) (dicta).

from character disorders or exhibit psychopathic personalities. Still another might insist upon a showing of dangerousness to self or others. And a fourth psychiatrist might require that the patient be likely to receive suitable treatment for his mental disorder in the hospital where he will be confined. Pennsylvania delegates complete discretion for these decisions to the psychiatrist without assuring that there will be any overview of the psychiatrist's judgment. Placing only the psychiatrists between the parent and hospitalization of the child, the Pennsylvania scheme does nothing to protect against the unnecessary hospitalization which is certain to occur given the inadequacies of the psychiatric diagnoses referred to above. Moreover, these inadequacies in diagnoses are made more serious by the utter lack of standards under Pennsylvania law to govern placement of minors in mental hospitals. Hence, the Pennsylvania scheme provides only an unsystematic, haphazard, and largely ineffectual check upon parental discretion.

It is also important to recognize the conditions under which psychiatrists in both mental hospitals and community mental health centers evaluate the children for possible commitment purposes. As Professor Stone has noted,

> The feeling of crisis which attends the process of emergency confinement rarely permits the full exploration of the patient's competence. Stone, *Mental Health and Law: A System in Transition* 48, National Institute of Mental Health (DHEW Pub. No. (ADM) 75-176, 1975).

Not only are many community mental health centers and mental hospitals understaffed[56] but equally significant, most physicians

> learn early in their training that it is far more culpable to dismiss a sick patient than to retain a well one. Scheff, *Being Mentally Ill: A Sociological Theory* 110 (1966)

This has led to the conservative bias of almost all psychiatrists in favor of over-diagnosing mental illness,[57] as contrasted with the criminal law's presumption that defendants are both innocent and sane. It is understandable that a physician trained in treating illness would prefer to commit a healthy person to a mental hospital rather than allowing a mentally ill person to go free, but such a practice is hardly consistent with the constitutional guarantee that liberty shall not be infringed without due process of law.

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[56]Mechanic, *Some Factors in Identifying and Defining Mental Illness*, 46 *Mental Hygiene* 66 (1962).

[57]Scheff conducted a study of mental commitments drawn from psychiatrists' ratings of a sample of patients newly admitted to public mental hospitals in a Midwestern state. He found that in two-thirds of the hospitals the examinations were perfunctory and virtually never resulted in findings of health. In some instances the decision to retain a patient was reached even when no evidence of any mental disorder could be found. Scheff, *Being Mentally Ill: A Sociological Theory* 142 *et seq.* (1966).

Mechanic reports that in two mental hospitals studied over a period of three months he ". . . never observed a case where the psychiatrist advised the patient that he did not need treatment. Rather, all persons who appeared at the hospital were absorbed into the patient population regardless of their ability to function adequately outside the hospital." Mechanic, *Some Factors in Identifying and Defining Mental Illness*, 46 *Mental Hygiene* 66, 70 (1962). Brown has referred to the practice of large state mental hospitals which admit "everyone sent for hospitalization." E. L. Brown, *Newer Dimensions of Patient Care*, pt. I, at 60 (1961).

Finally, given the inherent bias of the psychiatrist in favor of finding illness, and the time and resource constraints upon the initial evaluation, the fact that a parent has decided that a child is sufficiently mentally ill to warrant his institutionalization is likely to substantially predispose the physician to join in the parent's appraisal.[58] Even a physician who questions the parent's evaluation is likely to approve the commitment in order to provide sufficient time for a thorough examination and diagnosis. Once the child is present in the mental institution, there is considerable evidence that he may adopt the "deviant" behavior of other patients as his own, thus confirming the institution's diagnosis.[59] And even if evaluation ultimately results in the minor's discharge, he already will have suffered a considerable deprivation of liberty warranting due process protection. *See, e.g., Bell v. Burson,* 402 U.S. 535 (1971); *Black Coalition v. Portland School District No. 1,* 484 F.2d 1040 (9th Cir. 1973).

6. Mature, Intelligent and Competent Adolescents Should Not Be Disqualified From Participating in the Judicial Process Simply Because They Are Minors.

Amicus believes that a final factor which should be accorded substantial weight in any decision affecting

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[58] "[W]here the parent admits a child for treatment, the examining doctor may quite naturally identify with the interest of the parent. If [this], happen[s], the doctor would be unable to act effectively as a screening agent at the initial stage of examination." *In re Long,* 25 N.C. App. 702, 214 S.E. 2d 626, 629 (1975); *see* Scheff, *Being Mentally Ill: A Sociological Theory* 149 (1966).

[59] See E. Goffman, *Characteristics of Total Institutions,* in *Symposium on Preventive and Social Psychiatry* (1957); H. Dunham and S. Weinberg, *The Culture of the State Mental Hospital* (1960).

vital interests of a child is the child's capacity to make mature, intelligent, and competent decisions about what is in his best interests. The Pennsylvania statutory scheme is anomalous in vesting total discretionary power in the parent irrespective of the child's age, maturity, or competence. Pa. Stat. Ann. tit. 50 §§4202 and 4203. No child may place himself in a state mental hospital, whereas any parent—irrespective of age, intelligence, competence, or motive—may place his child in a state hospital subject only to the approval of two psychiatrists. These Pennsylvania statutory provisions are overbroad in creating irrebutable presumptions that all minors are incapable of making reasoned and competent decisions as to whether their custodial treatment in state mental institutions is desirable and appropriate. Whereas many minors are, in fact, not competent to make such decisions, this Court has never intimated that all children are *per se* incapable of waiving their constitutional rights. *See Gallegos v. Colorado,* 370 U.S. 49 (1962); *Haley v. Ohio,* 332 U.S. 596 (1948). To the contrary, in *Planned Parenthood of Central Missouri v. Danforth,* 44 U.S.L.W. 5197 (U.S. July 1, 1976), this Court recognized the independent right of mature, competent minors to participate in the decision as to whether to terminate their pregnancies. 44 U.S.L.W. at 5204. In creating an all-inclusive, irrebutable presumption, the Pennsylvania procedure

> . . . forecloses the determinative issues of competence and care . . . [and] needlessly risks running roughshod over the important interests of both parent and child. *Stanley v. Illinois,* 405 U.S. 645, 657 (1972).

Such irrebutable presumptions have traditionally been disapproved by this Court, and have been found unconstitutional in a number of cases. *See Vlandis v. Kline,* 412 U.S. 441 (1973); *Stanley v. Illinois, supra; Carrington v. Rash,* 380 U.S. 89 (1965).

The National Institute of Mental Health's *Draft Act Governing Hospitalization of the Mentally Ill* (Pub. Health Services Pub. No. 51, 1951) establishes sixteen as the age at which persons should be able to seek hospitalization on their own initiative or, once hospitalized, request their own release. The Act's *Commentary* however, argues for an even lower age based upon the legal capacity of adolescents to consent to surgery or their legal responsibility for criminal conduct.

In Pennsylvania, the age of criminal responsibility is fourteen. Pa. Stat. Ann. tit. 11, sec. 260; *see Commonwealth v. Frisby,* 451 Pa. 16, 301 A.2d 610 (1973). In many other respects Pennsylvania law treats minors as capable of making important decisions in their own best interests. Minors over the age of twelve years must consent to their own adoptions. Pa. Stat. Ann. tit. 1, § 2. Minors over the age of sixteen, who are of sufficient mental ability, may become emancipated by their own acts or the acts of their parents. Pa. Stat. Ann. tit. 62, §2331(f). Finally, service of pleadings is required in any legal action upon a defendant above the age of fourteen. Pa. Stat. Ann. tit. 12, §362. These statutes are generally in accord with the overwhelming consensus of developmental psychologists that a child of twelve or thirteen begins to develop significant mental capacity which, by age sixteen, is firmly established.[60]

Commendably, Pennsylvania has acted, albeit belatedly, to accord minors over the age of thirteen years certain rights. These include the right to notification that the minor may challenge the grounds for his institutionalization; the right to a hearing under Pa. Stat. Ann. tit. 50, §4406; and the right to be furnished the telephone number of counsel whom the minor may call for representation.[61] The regulations, however, fall short of treating even mature adolescents as capable of assuming responsibility. No minor may volunteer himself for treatment. No minor may receive treatment pursuant to Pa. Stat. Ann. tit. 50, §§4402 and 4403 without parental consent. And many of the procedural rights which were held to be an integral aspect of due process by the court below are denied even those minors who are over the age of thirteen. These include the right to a probable cause determination as to the grounds for institutionaliza-

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[60]The person who has pioneered in this area has concluded that qualitative changes in the direction of adult thought begins at age 12-13. J. Piaget, *The Moral Judgment of the Child* (1932). *See* Note, *State Intrusion into Family Affairs: Justifications and Limitations,* 26 *Stan. L. Rev.* 1383, 1395-97 (1974): "Beginning in early adolescence, the child is able to deal with abstract concepts and ideals such as love, equality, and society [citing J. Hill and J. Shelton, *Readings in Adolescent Development and Behavior* 84 (1971)], and to anticipate and evaluate future consequences." 26 *Stan. L. Rev., supra,* 1395 n. 66. *See* Adelson and O'Neil, *Growth of Political Ideas in Adolescence: The Sense of Community,* 4 *J. Pers. and Soc. Psychol.* 295 (1966). By age 16 the cognitive transformation is basically completed and adult mental operations are firmly established. *See* Elkind, *Egocentrism in Adolescence,* 38 *Child Develop.* 1025, 1032 (1967).

[61]Pa. Dept. of Public Welfare, Pa. Bull., Vol. 3, at 1840, Sept. 1, 1973.

tion; the right to a reasonably prompt post-commitment hearing; the right to appointed counsel if indigent;[62] the right to confrontation and cross-examination; the right of the minor to be present at the §406 hearing; and the right to have the basis for the minor's commitment established by "clear and convincing evidence".

Although *Amicus* supports the initial steps that Pennsylvania has taken in recognizing the developmental distinctions between immature minors and older adolescents through enactment of regulations pursuant to Pa. Stat. Ann. tit. 50, §§4402-03, nevertheless, the regulations themselves cannot be said to actually accord mature, competent minors a meaningful role in the commitment decision. The regulations authorize involuntary commitment of a minor for an indefinite period of time before any justification for such a confinement can be scrutinized at a judicial hearing. And they fail to guarantee that at the hearing which may be held subsequently, minors will be provided rights long considered fundamental to due process. Thus, although belatedly offering some minors a semblance of due process, Pennsylvania has failed to establish procedures or safeguards commensurate either with the rights that are being infringed or with the potential consequences that are being imposed.

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[62]The Pennsylvania regulations only require that minors over the age of thirteen be given the telephone number of the public defender or local legal services office. They do not provide that the minor has a right to counsel in the event that the public defender or legal services attorney is incapable or unwilling to represent the minor.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the brief of Appellees, *Amicus* urges that this Court affirm the judgment below.[63]

Dated, San Francisco, California,
July 28, 1976.

Respectfully submitted,
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[63]Counsel for *Amicus* wish to express their appreciation for the assistance of Renee Torres and Sheila Gropper in the preparation of this brief.